(1) Supreme Court, U.S.
FILED

NO. 00 208 AUG 7 - 2000

OFFICE OF THE CLERK

# IN THE SUPREME COURT OF THE UNITED STATES

CLAUDIA DEGENNARO,

*Petitioner,*

v.

ROBERT C. FURR, chapter 7 trustee,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

Claudia DeGennaro, *Pro Se*
462 S.W. Molloy St.
Port St. Lucie, FL 34984
561/340-1960

36pp

## QUESTIONS PRESENTED

Whether, a trustee in bankruptcy can evade the due process clause of the Fifth Amendment to the United States Constitution, by ignoring the Federal Rules of Civil Procedure 4(c)(2)(C)(i), 4(c)(2)(C)(ii), 4(d)(1) and ignoring state law regarding service of process, Florida Rules of Civil Procedure F.S. §48.031, and obtain a default judgment denying the debtor's discharge, through mailing a summons and complaint to a knowingly closed post office box, knowing that the debtor and her family were being evicted from their home, and knowing an address of the debtor that was more reasonably calculated to effect service.

Whether the court of appeals erred by failing to apply its own prior decision in Manufacturers Hanover Trust Company v. Ponsoldt, 51 F.3d 938 (11th Cir. 1995) to this instant case.

Whether the decisions below conflicts with and are inconsistent with the decisions of this Court, including as to the meaning and import of this Court's decisions in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) and Robinson v. Hanrahan, 93 S.Ct. 30 (1972).

## LIST OF PARTIES

| **Petitioner** | **Counsel** |
|---|---|
| Claudia DeGennaro | Pro Se |
| **Respondent** | |
| Robert C. Furr | Furr & Cohen, P.A.<br>1499 W. Palmetto Park Rd.<br>Suite 412<br>Boca Raton, FL 33486 |
| **Other Parties** | |
| Janie Dean Chevrolet, Inc.<br>Patricia Dean<br>Estate of Roger Dean | Richard Goldstein, Esq.<br>Goldstein & Tanen, P.A.<br>Two South Biscayne Blvd.<br>Suite 3250<br>Miami, FL 33131 |
| United States Trustee | Solicitor General of the<br>United States<br>Department of Justice<br>950 Pennsylvania Ave., N.W.<br>Room 5614<br>Washington, D.C. 20530-0001 |

## TABLE OF CONTENTS

*Page*

Questions Presented ..... *i*

List of Parties ..... *ii*

Table of Contents ..... *iii*

Index to Appendix ..... *iv*

Table of Cited Authorities ..... *v*

Opinions Below ..... 1

Statement of Jurisdiction ..... 1

Constitutional and Statutory Provisions Involved ..... 2

Statement of the Case ..... 5

Reasons for Granting the Writ ..... 8

Conclusion ..... 13

Appendix

**Index to Appendix**

Appendix A
USCA 11th Circuit Opinion
(December 2, 1999) ..... App 1

Appendix B
USCA 11th Circuit Judgment
(December 2, 1999) ..... App 3

Appendix C
USCA 11th Circuit Denial for Rehearing and Rehearing En Banc
(March 28, 2000) ..... App 5

Appendix D
USCA 11th Circuit Denial for Rehearing
(March 28, 2000) ..... App 7

Appendix E
US District Court Judgment
(October 27, 1998) ..... App 9

Appendix F
US Bankruptcy Court Order
(November 12, 1996) ..... App 15

## TABLE OF CITED AUTHORITIES

**Cases:** ***Page***

*Coggin v. Coggin (In re Coggin),*
30 F.d 1443, 1450 n.8(11th Cir. 1994) ..... 7,11

*Hess v. Pawloski,*
274 U.S. 352 (1927) ..... 7,11

*Manufacturers Hanover Trust Company v. Ponsoldt,*
51 F.3d 938 (11th Cir. 1995) ..... 12

*Mullane v. Central Hanover Bank & Trust Co.,*
339 U.S. 306 (1950) ..... 7,10,11

*Robinson v. Hanrahan,*
93 S.Ct. 30 (1972) ..... 10

**Statutes, Rules and Regulations Cited:**

United States Constitution, Fifth Amendment ..... 2

*1992* Fed.R.Civ.P. 4(c)(2)(C)(i) ..... 3,11,12

*1992* Fed.R.Civ.P. 4(c)(2)(C)(ii) ..... 3,11,12

*1992* Fed.R.Civ.P. 4(d)(1) ..... 3,11,12

Fed.R.Civ.P. 60(b) ..... 8

*1992* Fed.R.Bankr.P.7001-7087 ..... 12

*1992* Fed.R.Bankr.P.7004(a) ..... 2, 11

*1992* Fed.R.Bankr.P.7004(b)(1) ..... 2

*1992* Fed.R.Bankr.P. 7004(b)(9) ..... 2,11,12

Fla.R.Civ.Proc.1.080(b) ..... 4, 11,12

F.S. §48.031, Florida Statutes ..... 4, 11,12

F.S. §48.161, Florida Statutes ..... 4,11,12

## OPINIONS BELOW

The written opinion of the United States Court of Appeals for the Eleventh Circuit is included in the appendix. *In re Claudia DeGennaro*, No. 98-5882 (11th Cir. December 2, 1999). The written opinion of the United States District Court, Southern District of Florida, is also included in the appendix. *In re Claudia DeGennaro*, No. 97-8162-CIV-Hurley (U.S.DC, October 28, 1998. The order of the United States Bankruptcy Court, Southern District of Florida, also is included in the appendix. *In re Claudia DeGennaro*, No. 92-30351-BKC-RAM, Adversary No. 92-1181-BKC-RAM-A (Bkrtcy.S.D.Fla., November 12, 1996).

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## JURISDICTION

The date on which the United States Court of Appeals decided this case was December 2, 1999. A petition for rehearing and a petition for rehearing en banc were timely filed. A timely petition for rehearing and a petition for rehearing en banc were both denied by the United States Court of Appeals on March 28, 2000.

An extension of time to file the petition for a writ of certiorari was granted to and including August 7, 2000 on June 22, 2000.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED

1. U.S. Constitution, Fifth Amendment

- *1992* Fed.R.Bankr.P.7004(a) provides:

(a) Summons; Service; Proof of Service. Rule 4(a), (b0, (c)(2)(C)(i), (d), (e) and (g)-(j) F.R.Civ.P. applies in adversary proceedings. Personal service pursuant to Rule 4(d) F.R.Civ.P. may be made by any person not less than 18 years of age who is not a party and the summons may be delivered by the clerk to any such person.

- *1992* Fed.R.Bankr.P.7004(b)(1) and (9) provides:

(b) Service by First Class Mail. In addition to the methods of service authorized by Rule 4(c)(2)(C)(i) and (d) F.R.Civ.P., service may be made within the United States by first class mail postage prepaid as follows:

(1) Upon an individual other than an infant or incompetent, by mailing a copy of the summons and complaint to the individual's dwelling house or usual place of abode or to the place where the individual regularly conducts a business or profession.

(9) Upon the debtor, after a petition has been filed by or served upon the debtor and until the case is dismissed or closed, by mailing copies of the summons and complaint to the debtor at the address shown in the petition or statement of affairs or to such other address as the debtor may designate in writing filed with the court and, if the debtor is represented by an attorney, to the attorney at the attorney's post-office address.

- *1992* Fed.R.Civ.P. Rule 4(c)(2)(C)(i) and (d) provides:

(c)(2)(C) A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (3) of subdivision (d) of this rule-

(i) pursuant to the law of the State in which the district court is held for the service of summons or other like process upon such defendant in an action brought in the courts of general jurisdiction of that State, or

(ii) by mailing a copy of the summons and of the complaint (by first class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to form 18-A and a return envelope, postage prepaid, addressed to the sender. If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3).

- *1992* Fed.R.Civ.P. Rule 4(d)(1) provides:

(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

- Fla.R.Civ.Proc.1.080(b) provides:

Service; How Made. When service is required or permitted to be made upon a party represented by an attorney, service shall be made upon the attorney unless service upon the party is ordered by the court. Service on the attorney or party shall be made by delivering a copy or mailing it to the attorney or the party at the last known address or, if no address is known, by leaving it with the clerk of the court. (In pertinent part)

- F.S. §48.031, Florida Statutes provides:

Service of process generally; service of witness subpoenas

(1)(a) Service of original process is made by delivering a copy of it to the person to be served with a copy of the complaint, petition, or other initial pleading or paper or by leaving the copies at his or her usual place of abode with any person residing therein who is 15 years of age or older and informing the person of their contents. Minors who are or have been married shall be served as provided in this section.

- F.S. §48.161, Florida Statutes provides:

Method of substituted service on nonresident

(1) When authorized by law, substituted service of process on a nonresident or a person who conceals his or her whereabouts by serving a public officer designated by law shall be made by leaving a copy of the process with a fee of $8.75 with the public officer or in his or her office or by mailing the copies by certified mail to the public officer with the fee. The service is sufficient service on a defendant who has appointed a

public officer as his or her agent for the service of process. Notice of service and a copy of the process shall be sent forthwith by registered or certified mail by the plaintiff or his or her attorney to the defendant, and the defendant's return receipt and the affidavit of the plaintiff or his or her attorney of compliance shall be filed on or before the return day of the process or within such time as the court allows, or the notice and copy shall be served on the defendant, if found within the state, by an officer authorized to serve legal process, or if found without the state, by a sheriff or a deputy sheriff of any county of this state or any duly constituted public officer qualified to serve like process in the state or jurisdiction where the defendant is found. The officer's return showing service shall be filed on or before the return day of the process or within such time as the court allows. The fee paid by the plaintiff to the public officer shall be taxed as cost if he or she prevails in the action. The public officer shall keep a record of all process served on him or her showing the day and hour of service.

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## STATEMENT OF THE CASE

During the spring of 1992, a trustee, Robert C. Furr was appointed to Claudia DeGennaro's bankruptcy case in the Southern District of Florida. The trustee had requested the turnover of certain documents that related to the bankruptcy and the debtor, Claudia DeGennaro complied in part. Nonetheless, the trustee stated that he had not received the documents. The debtor to avoid a problem, requested the trustee to, in the future, personally sign for all documents that the debtor would turnover. The trustee refused to sign for the documents personally.

Subsequently, on October 22, 1992, the debtor's

landlord noticed the trustee in a Motion for Relieve from the Automatic Stay in the bankruptcy court, so as to obtain permission to evict the debtor and her family from their home.

On November 12, 1992, the trustee filed an Adversary Proceeding, a complaint against the debtor to deny her discharge in the bankruptcy proceedings. He had directed that the summons and complaint be served on the debtor by mailing the documents by first-class mail to the debtor's closed post office box. This was the only method of service used by the trustee. The complaint alleged, among other things, that the debtor "changed residences and refused to disclose the new residence to the trustee".

The trustee continued to be in contact with the debtor's landlord's attorney during this time. On December 2, 1992, the bankruptcy court entered an "Amended Order" granting the debtor's landlord's Motion for Relief in the Automatic Stay, which such order gave the home address of the debtor and the trustee was supplied with a copy of the order.

On January 5, 1993 a Pretrial Conference on the trustee's Adversary Proceeding to deny the debtor's discharge, the trustee attended and the debtor did not because she had not received the summons and complaint. On January 19, 1993, the bankruptcy court entered a Final Judgment Denying Discharge of the debtor.

Then, in late 1995-1996, the debtor received some documents from the trustee (at the debtor's home address that the trustee obtained from researching the debtor's divorce proceedings[1]) pertaining to the bankruptcy proceedings. It was

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[1]The initial divorce proceedings were started and ongoing from approximately September 1992 through January 1993.

then at a subsequent hearing that the debtor learned the trustee had obtained a default judgment against her, denying her discharge.

On June 4, 1996, the debtor filed a Motion to Vacate and Reverse the Final Default Judgment Denying her Discharge. On November 12, 1996, the bankruptcy court entered an order denying the debtor's Motion to Vacate the Final Default Judgment denying the debtor's discharge. Judge Robert Mark held that (i) "the trustee was not obligated to diligently look through everything that was filed or to take note of everything that was filed in order to determine a home address" and (ii) that even if the trustee had actual knowledge of a new address sufficient to require service at some other address, "the trustee was under no obligation to utilize another address in attempting service."

**Federal District Court Proceedings**

The debtor appealed the bankruptcy court's findings to the United States District Court, Southern District of Florida. The district court held that Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) did not apply to the debtor's case, but rather applied Coggin v. Coggin (In re Coggin), 30 F.d 1443, 1450 n.8(11th Cir. 1994) and Hess v. Pawloski, 274 U.S. 352 (1927). The district court held that the trustee's mailing a summons and complaint to deny the debtor's discharge to a knowingly closed post office box was sufficient due process, because the debtor had not filed a change of address form.

**Eleventh Circuit Decision on Appeal**

The Eleventh Circuit, in a decision dated December 2, 1999, affirmed the district court's determination that "relief under Fed.R.Civ.P. 60(b) from the final judgment dismissing her

bankruptcy case: the question raises a service of process question."

The Eleventh Circuit held that the matter was based on a "final judgment *dismissing* her bankruptcy case" as opposed to the issue of denial of a Motion to Vacate a Default Judgment Denying the debtor's discharge. It is important to note that the bankruptcy court has not dismissed the bankruptcy case. The court acknowledged only one aspect of the debtor's request for relief - Fed.R.Civ.P. 60(b). The court did not specifically address the issue of whether a judgment is void under these present circumstances, but rather affirmed "for reasons stated by the district court".

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## REASONS FOR GRANTING THE WRIT

### Summary of Argument

Under the established Federal Rules of Civil Procedure and Federal Bankruptcy Rules, a party desiring to make service of a proceeding on an individual to deny discharge, is not only required to follow the federal rules, but is required to follow the respective state's rules. The Federal Rules, the Bankruptcy Rules and the State of Florida Rules do not specifically allow service to a closed post office box. These rules pertaining to service make reference to "individual's dwelling house or usual place of abode". Actual notice of the proceedings in an *in personam* proceeding, such as a denial of discharge, is important to be accomplished in order to protect the individual's constitutional rights.

Here the bankruptcy trustee knew, at the time of his filing a summons and complaint against the debtor to deny her

discharge in November 1992, that the debtor was in the process of being evicted from her home, knew the debtor was in the process of a divorce and further knew that the debtor's post office box was closed that the debtor had used only through July 1992. The debtor did not have legal counsel and knew nothing of a very technical and little known requirement in the bankruptcy proceedings that a Notice of Change of Address had to be filed with the court. Nonetheless the trustee decided to use only one method of service of process, mail by first-class to the closed post office box, so that he could evade actual service on the debtor, evade due process, and obtain a default judgment against the debtor. The facts here might be unusual, but the principal is not: fairness in due process and method of service of process must be reasonably calculated to provide actual notice.

## Argument

**A. A bankruptcy trustee, a person that unreservedly controls the case of the debtor, is responsible to review all documents that come into the case, and as such was noticed that the debtor was being evicted from her home. During the same time frame of the eviction, trustee chose to use a closed post office box, as opposed to the debtor's home address, as a place to mail his summons and complaint to deny the debtor's discharge, to evade actual notice and due process requirements.**

The courts in this case decided that a trustee is too busy to, and is not obligated to "look through everything that was filed or to take note of everything in order to determine a home address" and that the debtor was required to file a change of address. Oddly though, in careful thought, if the trustee was too busy or not obligated to look through everything, then how would he know if in fact the debtor had filed a change of address. Furthermore, the trustee in this case was in constant

home address and that she was being evicted from the home by not only conversations with the landlord's counsel, but by notices and important motions to lift the automatic stay which had the debtor's home address on the notices. The trustee was indeed obligated to review all these documents, as that is his job.

In review of the service of process it is important to consider the construction of the phrases "usual place of abode" and "individual's dwelling house". The terms that apply to this instant case and service of process include actual residence, the effect of divorce, last and usual place of abode, and the effect of persons being in process of moving . The courts in this case did not consider these issues or consider the fact that the debtor was in transition and was losing her home.

**B. The Eleventh Circuit Court has interpreted the term "reasonably calculated to provide actual notice" in a way that is inconsistent with the meaning and import of this Court's decisions in Mullane v. Central Hanover Bank & Trust Co. and Robinson v. Hanrahan.**

The Eleventh Circuit made a somewhat contradictory ruling by stating "for reasons stated by the district court, we affirm." In so holding, the Eleventh Circuit's adoption of the district court's decision overrode this court's law and intent in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) and in Robinson v. Hanrahan, 93 S.Ct. 30 (1972).

In Robinson v. Hanrahan as in this instant case, the underlying point is that even if a party followed a prescribed method of service and that party knew that the other party could not receive the intended mailed service, this manner of service was not reasonably calculated to apprise the party of the pendency of the proceedings and as such deprived the party of due process of law.

This Court found that in Mullane v. Central Hanover Bank & Trust Co. that "an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." The trustee here knew the debtor's home address, knew the debtor was being evicted and knew the debtor's post office box had been closed. In the courts in this instant case did not consider all the circumstances, but rather only clung to a little known, technical, and narrow bankruptcy rule that a debtor must file a Notice of Change of Address. Therefore, as to the question of whether the judgment was void in this instant case, the district court based its holding to deny vacating the default judgment on Coggin v. Coggin (In re Coggin), 30 F.3d 1443, 1450n.8(11th Cir. 1994) and Hess v. Pawloski, 274 U.S. 352 (1927) and Federal Rule of Bankruptcy Procedure 7004(b)(9) and did not apply the meaning or intent of Mullane v. Central Hanover Bank & Trust Co.

**C. The bankruptcy court, the district court and the court of appeals would not address the debtor's issues as to whether other rules of service of process applied to this instant case and the courts only applied Federal Rule of Bankruptcy Procedure 7004(b)(9).**

The debtor specifically requested the courts to decide whether other rules applied to the service of process, other than just Fed.R.Bankr.P.7004(b)(9). None of the courts replied to the request. The debtor sought a decision from the courts if the service of process of a summons and complaint on a debtor in 1992 to deny discharge was also subject to Fed.R.Civ.P. 4(c)(2)(C)and4(d)(1);Fed.R.Bankr.P.7004(a);and Fla.R.Civ.Proc.1.080(b), F.S. §48.031 and F.S. §48.161 Florida Statutes.

Specifically, an adversary proceeding, such as a proceeding to object to or revoke a discharge in the bankruptcy court is governed by Fed.R.Bankr.P.7001 and 7002. Both of these rules specify that the Federal Rules of Civil Procedure must be consulted and are applicable and incorporated in Fed.R.Bankr.P. 7001-7087.

The import of this is that the trustee only followed Fed.R.Bankr.P.7004(b)(9) and not Fed.R.Bankr.P.7004(b)(1), Fed.R.Civ.P. 4(c)(2)(C)and4(d)(1), Fla.R.Civ.Proc.1.080(b), and F.S. §48.031 and F.S. §48.161 Florida Statutes. Based on the rules of procedure in effect in 1992, the trustee was required to follow these other requirements to effect service on the debtor. These other requirements specifically required the trustee to serve the debtor either personally or if by mail, and no acknowledgment of service was received, to also serve personally.

**D. The Eleventh Circuit Court in the case at bar has failed to apply its own prior decision in Manufacturers Hanover Trust Company v. Ponsoldt.**

The district court would not address the debtor's cited case Manufacturers Hanover Trust Company v. Ponsoldt. to the instant, and because the Eleventh Circuit simply affirmed the district court's holding and did not comment on the law as applied to this case, the court of appeals erred by failing to apply its own law.

**E. The trustee's failure to give actual notice to the debtor of the impending proceedings to deny the debtor's discharge and the debtor not receiving a notice, and the subsequent default judgment entered against the debtor is a denial of the debtor's constitutional rights under the Fifth Amendment of the United States Constitution.**

**subsequent default judgment entered against the debtor is a denial of the debtor's constitutional rights under the Fifth Amendment of the United States Constitution.**

## CONCLUSION

For the aforementioned reasons, Petitioner, Claudia DeGennaro, respectfully requests this Court to grant certiorari and find that: (1) there is no due process when a party has knowledge of a more reasonable address (home address) and chooses to use closed post office box in attempt to obtain jurisdiction in an in personam proceeding, and (2) a default judgment obtained by such manner is void.

Respectfully submitted,

Claudia DeGennaro

Claudia DeGennaro, Pro Se
462 S.W. Molloy Street
Port St. Lucie, Florida 34948

Date: August 7th, 2000

**[DO NOT PUBLISH]**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

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No. 98-5882
Non-Argument Calendar

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D.C. Docket No. 97-08162-CV-DTKH

IN RE: CLAUDIA DEGENNARO,

Debtor.

CLAUDIA DEGENNARO,

Plaintiff-Appellant,

versus

ROBERT C. FURR, Trustee,

Defendant-Appellee.

---

Appeal from the United States District Court
for the Southern District of Florida

---

(December 2, 1999)

**Before EDMONDSON, BLACK and MARCUS, Circuit Judges.**

**PER CURIAM:**

Claudia Degennaro appeals the district court's denial of her motion for relief under Fed.R.Civ.P. 60(b) from the final judgment dismissing her bankruptcy case: the case raises a service of process question. For the reasons stated by the district court, we affirm.

AFFIRMED.

**United States Court of Appeals**
**For the Eleventh Circuit**

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No. 98-5882
Non-Argument Calendar

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District Court Docket No. 97-08162-CV

IN RE: CLAUDIA DEGENNARO,

Debtor.

CLAUDIA DEGENNARO,

Plaintiff-Appellant.

versus

ROBERT C. FURR, Trustee,

Defendant-Appellee.

---

Appeal from the United States District Court
for the Southern District of Florida

---

Before EDMONDSON, BLACK and MARCUS, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT the plaintiff-appellant pay to the defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: December 2, 1999
For the Court: Thomas K. Kahn, Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: APR 06, 2000

*App. 5*

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

No. 98-5882-CC

FILED
U.S. COURT OF
APPEALS
ELEVENTH CIRCUIT
MAR 28, 2000
THOMAS K. KAHN

IN RE: CLAUDIA DEGENNARO,

Debtor,

CLAUDIA DEGENNARO,

Plaintiff-Appellant,

versus

ROBERT C. FURR, Trustee,

Defendant-Appellee.

---

On Appeal from the United States District Court for the
Southern District of Florida

---

ON PETITION(S) FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19____, _____ _F.2d_____).

Before: EDMONDSON, BLACK, and MARCUS

PER CURIAM:

The Petition (s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ G.L. Edmondson
UNITED STATES CIRCUIT JUDGE

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

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No. 98-5882-CC

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FILED
U.S. COURT OF
APPEALS
ELEVENTH CIRCUIT
MAR 28, 2000
THOMAS K. KAHN

IN RE: CLAUDIA DEGENNARO,

Debtor.

CLAUDIA DEGENNARO,

Plaintiff-Appellant,

versus

ROBERT C. FURR, Trustee,

Defendant-Appellee.

---

On Appeal from the United States District Court for the Southern District of Florida

---

BEFORE: EDMONDSON, BLACK, and MARCUS, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by the Appellant, Claudia DeGennaro, is DENIED.

ENTERED FOR THE COURT:

/s/ G.L. Edmondson
UNITED STATES CIRCUIT JUDGE

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

In re:
CLAUDIA DEGENNARO and
ANTHONY DEGENNARO,

Debtors.
_____/

CLAUDIA DEGENNARO,

Appellant,

CASE NO. 97-8162-CIV-HURLEY

v.

ROBERT C. FURR,

Appellee.
_____/

**JUDGEMENT**

## I. BACKGROUND

**THIS MATTER** comes before the Court on appeal from a final order of the United States Bankruptcy Court for the Southern District of Florida, Robert Mark, Judge. The bankruptcy petition was originally filed under Chapter 11 in the Eastern District of New York but was subsequently converted to a Chapter 7 bankruptcy and transferred to the Southern District of Florida, where Robert C. Furr was appointed the Chapter 7 Trustee in Bankruptcy.[1] The Trustee moved to consolidate the petitions of the appellant-debtor, Claudia DeGennaro, (hereinafter "Appellant") and her former spouse, Anthony DeGennaro, and the Bankruptcy Court consolidated

the petitions.

The debtors did not attend the first §341 meeting scheduled, and although in attendance at the second meeting, they refused to respond to the questions posed. On November 12, 1992, the Trustee filed an adversary complaint objecting to the debtors' discharge on numerous grounds. The complaint, summons and order setting filing and disclosure requirements were served by first class mail on the address contained in the debtors' schedules and pleadings.[2] At a pretrial conference held on January 5, 1993, before Bankruptcy Judge Mark, the debtors failed to appear, and the Trustee moved for entry of default judgment in his favor. On January 19, 1993, the Bankruptcy Court entered a Final Judgment Denying Discharge of Debtors (hereinafter the "judgment") for failure to file any responsive pleading and failure to attend the ordered pretrial conference. Three and one- half years later (June 5, 1996), Appellant filed her Motion to Vacate and Reverse the Final Judgment Denying Discharge of Debtor. After hearing evidence on why the Judgment should be set aside, the Bankruptcy Court denied Appellant's motion to vacate. That order denying Appellant relief is the years later (June 5, 1996), Appellant filed her Motion to Vacate and Reverse the Final Judgment Denying Discharge of Debtor. After hearing evidence on why the Judgment should be set aside, the subject of this appeal.

## II. DISCUSSION

The Bankruptcy Court's findings of fact will not be set

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[1] Hereinafter, the Court will refer to appellee Robert Furr as the "Trustee."

[2] The address to which the Trustee mailed service was: 4300 U.S. Highway 1, Suite 203-329 Jupiter, FL 33477. It was a private post office box located at a Mailboxes, Etc. store.

aside unless clearly erroneous. Fed.R.Bank.P.8013; Green Tree Acceptance, Inc. v. Calvert (In re Calvert), 907 F.2d 1069, 1071 (11th Cir. 1990). This Court reviews de novo the Bankruptcy Court's conclusions of law. Calvert, 907 F.2d at 1071. Appellant contends that the Bankruptcy Court erred in denying her motion to vacate on numerous grounds. The Court has distilled Appellant's claims of error into the following two issues:

1. Whether the Judgment was void due to the Trustee's alleged failure to serve the complaint upon Appellant by a means reasonably calculated to provide actual notice?

2. Whether Appellant sought to set aside the Judgment within a reasonable time?

The Court answers both questions in the negative.

A. Whether the Judgment was Void

Appellant argues the Judgment was void because she was not properly served, i.e., she did not receive actual notice of the complaint and the mailing of the complaint was not likely to provide her with actual notice. Federal Rule of Civil Procedure 60(b)(4) allows a party to set aside a final judgment that is void. There is no time limit in which a party must bring a Rule 60(b)(4) motion to set aside a void judgment. See Hertz Corp. v. Alamo Rent-A-Car, Inc., 16 F.3d 1126, 1130 (11th Cir. 1994)(citing 11 WRIGHT & MILLER, Federal Practice and Procedure §2862 at 200 (1973). Courts will find judgments to be void when service has not been properly effected. See Varnes v. Local 91, Glass Bottle Blowers Assoc. of United States and Canada, 674 F.2d 1365, 1368 (11th Cir. 1982).

The Bankruptcy Court made several findings of fact with regard to the service of process in this case. See Tr. 150-62.[3] First, the Appellant's address of record was the private post office box located at 4300 U.S. Highway 1, Suite 203-329 Jupiter, FL 33477. Second, Appellant filed no writing indicating a change of that address. Third, by her own choice, Appellant stopped retrieving mail from her post office box in June 1992, but she still used that address on subsequent pleadings filed with the court in July. Fourth, the Trustee's actions with regard to service conformed to the requirements of Federal Rule of Bankruptcy Procedure 7004(b)(9), i.e., service by first-class mail to the record address of the debtor. The record on appeal supports these findings; therefore, they are not clearly erroneous.

Based on these findings, the Bankruptcy Court concluded, as a matter of law, that the Trustee's mailing of the complaint to Appellant's record address constituted proper service, and the Judgment was not void. Relying on Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), Appellant argues the court erred in concluding service was proper because the mailing of service to her post office box was not a method reasonably calculated to provide her actual notice, as required by due process.[4] This argument fails. Because Federal Rule of Bankruptcy Procedure 7004(b)(9) explicitly provides for service by first-class mail at the debtor's record address, service conforming to that section

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[3] "Tr." denotes the transcript from the Bankruptcy Court's October 30, 1996, hearing on Appellant's Motion to Vacate Final Judgment Denying Discharge of Debtor.

[4] It is unclear exactly when Appellant closed the post office and when Mail Boxes, Etc. stopped accepting mail for Appellant. These ambiguities, however, are irrelevant because it is undisputed that Appellant did not provide the court or the Trustee with a more current address.

is necessarily valid and cannot be the basis for voiding a final judgment. See Coggin v. Coggin (In re Coggin), 30 F.3d 1443, 1450 n.8 (11th Cir. 1994) (service pursuant to Bankr. Rule 7004(b)(9) is effective even if mailed to wrong address if that address was the last used by the debtor); see also Hess v. Pawlowski, 274 U.S. 352 (1927) (finding for the first time that service by mail does not violate due process). Appellant received all the process she was due under the Bankruptcy Code.

B. Whether Appellant Acted Within a Reasonable Time

Appellant's second claim is based on Federal Rule of Civil Procedure 60(b)(6), a catch-all provision providing for relief from a final judgment "for any other reason." A motion under Federal Rule of Civil Procedure 60(b)(6) must be made within a "reasonable" time. Whether a delay is reasonable is determined by evaluating all the circumstances. See Griffin v. Swim-Tech Corp., 722 F.2d 677, 680 (11th Cir. 1984). Appellant claims she acted within a reasonable time because she moved to vacate six months after learning of the Judgment on November 30, 1995.[5] The Bankruptcy Court concluded, as a matter of law, that Appellant did not act within a reasonable time. Tr. at 160.

Relief from a final judgment under Rule 60(b)(6) is an equitable remedy. See Griffin, 772 F.2d at 680. Appellant believes she is entitled to such equitable relief because she was dealing with difficult personal problems at the time the Judgment was entered and denial of discharge would be a great hardship. The Court accepts these premises as true. Nonetheless, the default and the extremely lengthy delay following it were

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[5] Appellant's motion to vacate was filed on June 5, 1996.

substantially, if not entirely, caused by Appellant. She simply stopped participating in the bankruptcy proceeding. This is not the type of conduct that justifies the extraordinary relief available under Rule 60(b)(6). See id.

## III. CONCLUSION

For the foregoing reasons, the Judgment of the Bankruptcy Court is hereby AFFIRMED.

The default judgment entered against Appellant will not be vacated.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 27th day of October, 1998.

/s/
Daniel T.K. Hurley
United States District Judge

**UNITED STATES BANKRUPTCY COURT**
**SOUTHERN DISTRICT OF FLORIDA**

IN RE:
CLAUDIA DEGENNARO and
ANTHONY DEGENNARO,

Debtors.
_____/

CASE NO. 92-30351-BKC-RAM
Chapter 7
Substantively Consolidated

ROBERT C. FURR, TRUSTEE IN BANKRUPTCY,

Plaintiff,

vs.

CLAUDIA DEGENNARO and
ANTHONY DEGENNARO,

Defendants.
_____/

ADV. NO. 92-1181-BKC-RAM-A

ORDER DENYING DEBTOR, CLAUDIA DEGENNARO'S MOTION TO VACATE FINAL DEFAULT JUDGMENT

THIS CAUSE came before the Court for evidentiary hearing on Wednesday, October 30, 1996, on the Motion of the Debtor, Claudia DeGennaro to Vacate Final Default Judgment. The Court having heard argument and being otherwise duly

advised in the premises, it is hereby

ORDERED AND ADJUDGED

1. For the reasons set forth on the record, the motion of the Debtor, Claudia DeGennaro, to vacate Final Default Judgment is hereby denied.

DONE AND ORDERED in the Southern District of Florida this 12th day of November, 1996.

/s/
ROBERT A. MARK
UNITED STATES
BANKRUPTCY JUDGE

(2)

No. 00-208

SUPREME COURT, U.S.
FILED
SEP - 6 2000
CLERK

IN THE

# Supreme Court of the United States

CLAUDIA DEGENNARO,

*Petitioner,*

*v.*

ROBERT C. FURR, Chapter 7 Trustee,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## BRIEF IN OPPOSITION

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## TABLE OF CONTENTS


| | Page |
|---|---|
| Table of Cited Authorities | ii |
| Statement of the Case | 1 |
| A. The Federal District Court Proceedings | 4 |
| B. The 11th Circuit Decision on Appeal | 5 |
| Reasons for Denying the Writ | 6 |
| A. Petitioner's Argument is Contrary to the Undisputed Facts and Procedural Rules | 6 |
| B. Due Process Requirements Were Complied With | 8 |
| C. Alternative Methods of Service of Process Are Inapplicable | 9 |
| D. The 11th Circuits Decision in *Ponsoldt* Was Followed | 10 |
| E. Petitioner's Constitutional Rights Were Not Violated | 10 |
| Conclusion | 10 |
| Appendix — Excerpts From Transcript Of Motion To Vacate Final Judgment Denying Discharge Of Debtor Of The United States Bankruptcy Court For The Southern District Of Florida Dated October 30, 1996 | 1a |

## TABLE OF CITED AUTHORITIES

*Page*

**Cases:**

*Coggin v. Coggin*, 30 F.3d 1443 (11th Cir. 1994) .. 4, 9

*Hess v. Pawloski*, 274 U.S. 352 (1927) ..... 4, 9

*Manufacturers Hanover Trust Company v. Ponsoldt*, 51 F.3d 938 (11th Cir. 1995) ..... 10

*Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) ..... 4, 8

*Robinson v. Hanrahan*, 93 S. Ct. 30 (1972) ..... 8

**Statutes:**

11 U.S.C. § 727(a)(2)(B) ..... 2

11 U.S.C. § 727(a)(3) ..... 2

11 U.S.C. § 727(a)(4) ..... 2

11 U.S.C. § 727(a)(5) ..... 2

11 U.S.C. § 727(a)(6)(A) ..... 2

11 U.S.C. § 727(a)(6)(C) ..... 2

**United States Constitution:**

Fifth Amendment ..... 10

*Cited Authorities*

*Page*

**Rules:**

Bankruptcy Rule of Civil Procedure 7004(b)(9) ..... *passim*

Bankruptcy Rule of Civil Procedure 7055 ..... 4

Bankruptcy Rule of Civil Procedure 9024 ..... 4

Federal Rules of Civil Procedure 55(c) ..... 4

Federal Rules of Civil Procedure 60(b) ..... 4

**Other Authority:**

Meeting of Creditors § 341 ..... 1

## STATEMENT OF THE CASE

This case is based on a bankruptcy that was originally filed as a Chapter 11 in the Eastern District of New York to avoid a foreclosure sale scheduled for the next day. The Petitioner listed significant assets, ongoing businesses, and cash revenues and was afforded a privilege to be a Debtor-in-Possession.

In February, 1992, the bankruptcy court converted the bankruptcy to a Chapter 7, with the specific findings that the Petitioner had obstructed justice, failed to comply with the Debtor-in-Possession fiduciary obligations, and otherwise violated the requirements placed upon her as a Debtor-in-Possession. The case was transferred to the Southern District of Florida and Robert C. Furr was appointed the Chapter 7 Trustee in Bankruptcy.

Pursuant to the conversion and transfer, the Petitioner's § 341 Meeting of Creditors was scheduled for June 11, 1992. The Petitioner did not attend that meeting and the Trustee filed a motion requesting that the court order the Petitioner to appear at a second § 341 Meeting. The Court did grant such an Order and although the Petitioner did attend that § 341 Meeting on July 22, 1992, she refused to answer or respond to a single question posed by the Trustee. On April 30, 1992, the Court entered an Order commanding the turnover of books and records as well as the possession of two vehicles to the Trustee. None of those documents or vehicles were turned over. On July 5, 1992, the Bankruptcy Court entered an Order denying the Petitioner's motion for rehearing of the April 30, 1992, Order. This Order again required the Petitioner to turnover certain property and documents. The Petitioner never obeyed this Order.

On July 14, 1992, the Bankruptcy Court entered an Order commanding the turnover of rents from the Petitioner to the Trustee. The Petitioner failed to abide by that Court Order. On November 12, 1992, the Trustee filed an adversary complaint objecting to the Petitioner's discharge on numerous grounds, including the Petitioner's failure to abide by the previously entered Court Orders, and her failure to cooperate with the Trustee in the administration of the estate.

Of particular significance was Paragraph 13 of the Complaint wherein the Trustee alleged that despite repeated requests, the Petitioner refused to divulge to the Trustee her residence address as the Petitioner had moved from her original residence post-petition.

The Complaint filed in this case sought to deny Petitioner's discharge pursuant to 11 U.S.C. § 727(a)(3) (concealing books and records from which the debtor's financial condition might be ascertained), § 727(a)(4) (knowingly and fraudulently making a false oath), § 727(a)(2)(B) (transferring property post-petition with the intent to hinder, delay or defraud creditors), § 727(a)(5) (failure to explain loss of assets), § 727(a)(6)(A) (failure to obey a lawful order of the court), and § 727(a)(6)(C) (failure to respond to a material question or to testify other than a proper invocation of Fifth Amendment Privileges. The Complaint, Summons and Order Setting Filing and Disclosure Requirements for Pretrial and Trial were served pursuant to Bankruptcy Rules of Civil Procedure 7004(b)(9) by first class mail to the address contained in the Debtor's Schedules and pleadings, to wit: 4300 U.S. Highway #1, 203-329, Jupiter, FL 33477 (this was a rented mailbox at Mailboxes, Etc.). This was the address set forth by the Petitioner on her Amended Bankruptcy Schedules filed on

May 4, 1992. Pursuant to the Court Order on filing and disclosure requirements for pretrial and trial issued in the adversary proceeding, the parties were required to attend a pretrial conference. A pretrial conference was held on January 5, 1993, and due to the Petitioner's failure to appear, the Trustee made an *ore tenus* motion for default judgment.

On January 19, 1993, the Bankruptcy Court entered a Final Judgment Denying Discharge of Debtor for failure to file any responsive pleading in the adversary proceeding and the failure to attend the Court Ordered conference.

On June 4, 1996, three and a half years after the date of Default Judgment, the Petitioner filed a Motion to Vacate and Reverse the Final Judgment Denying Discharge of Debtor. An evidentiary hearing was held by the Bankruptcy Court on October 30, 1996. At that hearing, the Petitioner testified that she had closed the mailbox address at Mailboxes, Etc. no later than June of 1992. She was unable to explain, however, why as of at least July of 1992, while she was still filing pleadings with the Bankruptcy Court, she was using that same address. The Petitioner further testified that as of approximately June or July of 1992, she was having many personal problems and therefore stopped picking up her mail. Thus, even were the box not closed as she testified, she would not have received the pleading based upon her own actions.

The unrefuted testimony as well was that the Trustee's office did not receive the Complaint back in the mail from the closed Mailboxes, Etc. box until April 30, 1993. In addition, the Petitioner never changed her address with the Court as required by the Bankruptcy Code.

At the time of the hearing, the Court made factual findings beginning at Page 150 of the Transcript and continuing through Page 163 (see Appendix A). Broken down to its most basic elements, the Court found that: (a) proper service of process was obtained upon the Petitioner, Claudia Degennaro, at the address she listed in the Bankruptcy Schedules; (b) the Petitioner failed to show that the required elements of Federal Rules of Civil Procedure 55(c) made applicable in adversary proceedings by Bankruptcy Rule 7055 as well as the Federal Rules of Civil Procedure 60(b), made applicable to adversary proceedings pursuant to Bankruptcy Rule 9024, had been met. Specifically, (1) Petitioner failed as to the element of excusable neglect and that based upon the Petitioner's own testimony, she stopped checking her mail due to personal reasons; (2) Petitioner failed to act with due diligence as required by the Rules in waiting 41 months or 3 ½ years before filing her motion. The Petition for Writ of Certiorari fails to recognize these findings.

**A. The Federal District Court Proceedings**

The Petitioner appealed the Bankruptcy Court's findings to the United States District Court, Southern District of Florida. Contrary to the Petitioner's argument that "the District Court held that *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) did not apply to the [Petitioner's] case", the Court held that the Petitioner's argument pursuant to that case failed because the method of service was reasonably calculated to provide her with actual notice. The District Court further relied on the binding authority of *Coggin v. Coggin (In re Coggin)*, 30 F.2d 1443 (1450) (11th Cir. 1994) and *Hess v. Pawloski*, 274 U.S. 352 (1927) for the proposition that service of process was proper.

The Petitioner further argues that "the District Court held that the Trustee's mailing his summons and complaint to deny the Debtor's discharge to a knowingly closed post-office box was sufficient due process . . .". There are no findings by the District Court that the Trustee knew the post-office box was closed. In fact, at Footnote 4 of its Opinion, the District Court specifically held "it is unclear exactly when Appellant closed the post-office box and when Mailboxes, Etc. stopped accepting mail for Appellant. These ambiguities, however, are irrelevant because it is undisputed that Appellant did not provide the Court or the Trustee with a more current address."

The District Court further recognized that Federal Rule of Bankruptcy Procedure 7004(b)(9) explicitly provides for service by first class mail at the Petitioner's record address. The District Court further found that the bankruptcy trustee did in fact comply with this Rule, a Rule which was promulgated by this Court.

**B. The 11th Circuit Decision on Appeal**

The Trustee agrees with the statement set forth by the Petitioner under the caption "11th Circuit Decision on Appeal".

## REASONS FOR DENYING THE WRIT

The Petitioner raises five (5) arguments in her Petition for Writ of Certiorari as to why this Court should exercise jurisdiction over this case. Each argument will be addressed in the order of appearance in the initial Petition.

### A. Petitioner's Argument is Contrary to the Undisputed Facts and Procedural Rules

Petitioner's argument under Section A is two-fold. First, that the Trustee should have been obligated to look through every document in the file to attempt to determine a better address, and secondly, the service of process statutes refer to "usual place of abode" and "individual dwelling house", thus requiring service to be made at one of those two places.

As to the first argument, the Court properly determined that the Bankruptcy Code *requires* the Trustee to make service of process at the address which the Debtor lists as her address on the bankruptcy Schedules. In the instant case, the Debtor filed amended schedules changing her address to the post-office box with Mailboxes, Etc. Trustee also made as part of his complaint, an allegation that Debtor refused to give the Trustee her accurate residence address.

None of these facts were disputed at the time of the initial hearing other than the Debtor arguing that the Trustee should have tried to find a better address. Bankruptcy Rule of Civil Procedure 7004(b)(9) specifically requires the Trustee to make service at the address listed by the Debtor in her schedules. This is what the Trustee did. The Trustee had no reason to believe this was an inaccurate address and fully complied with the Rules. It is also important to note that the

Debtor herself testified that she stopped picking up her mail due to personal reasons and this was a large factor in the Court's determination that any failure by the Debtor to receive service of process was due to her own actions.

As to the second part of the argument, while it is true that certain sections in the service of process statutes, whether federal, state or bankruptcy, do refer to the "usual place of abode" or "individual dwelling house", the statute upon which the Trustee served states

> . . . service may be made within the United States by first class mail postage prepaid as follows: . . . Upon the debtor, after a petition has been filed by or served upon the debtor and until the case is dismissed or closed, by mailing a copy of the summons and complaint to the debtor at the address shown in the petition or statement of affairs or to such other address as the debtor may designate in a filed writing and, if the debtor is represented by an attorney, to the attorneys at the attorney's post-office address.

BRCP 7004(b)(9).

In the instant case, the Debtor was not represented by an attorney and listed on her amended schedules the Mailboxes, Etc. post-office box. The issues raised by the Debtor were considered by the Court and rejected as the Trustee had fully complied with Rule 7004(b)(9) of the Bankruptcy Rules of Civil Procedure as promulgated by this Court.

**B. Due Process Requirements Were Complied With**

Petitioner next argues that the 11th Circuit's decision is inconsistent with the meaning and import of this Court's decisions in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) and *Robinson v. Hanrahan*. A review of these cases, however, shows that the Debtor's argument is misplaced. *Mulane v. Central Hanover Bank & Trust* actually supports the Trustee's position. The Court therein held that the requirement of due process is notice reasonably calculated, under all the circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present their objections. "But if with due regard to the practicalities and peculiarities of the case, these conditions are reasonably met, constitutional requirements are satisfied. . . . The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." In the instant case, the Petitioner elected to file bankruptcy. Petitioner elected to bring herself under the jurisdiction of the bankruptcy court and subject to the Bankruptcy Rules. The Petitioner then elected to ignore those Rules, not pick up her mail, disregard court orders, and refuse to give her residence address to any party involved in the case. The Bankruptcy Rules do provide a reasonable method for providing notice of a proceeding to a debtor who has elected to be in the bankruptcy court. As such, the standards set forth under *Robinson v. Hanrahan* have been met.

In addition, in *Robinson v. Hanrahan*, 93 S. Ct. 30 (1972), the Court once again had noted that due process requires notice reasonably calculated, under all the circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present their

objections. The Petitioner then argues that the Trustee knew the Debtor's home address and knew that the post-office box had been closed. The evidence before the bankruptcy court was to the contrary. The unrefuted evidence was that the Trustee did not know the Debtor's home address and was unaware of the closure of the post-office box. In fact, both the Bankruptcy Court and District Court noted that it was unclear when the box was actually closed as the Debtor's actions in using the post-office box for a mailing address on pleadings was contrary to her testimony that the box had already been closed. Thus, the Bankruptcy Court, District Court and 11th Circuit Court of Appeals properly relied on *Coggin v. Coggin*, 30 F.3d 1443 (11th Cir. 1994) and *Hess v. Pawloski*, 274 U.S. 352 (1927) and Bankruptcy Rules of Procedure 7004(b)(9) in determining that the due process standards in this case had been met.

## C. Alternative Methods of Service of Process Are Inapplicable

Debtor next argues that Bankruptcy Court, District Court and 11th Circuit Court of Appeals did not address the Debtor's issues of whether other Rules on service of process applied. To the contrary, the Bankruptcy Court specifically addressed whether other Rules applied and found that the Trustee only needed to comply with Bankruptcy Rule of Procedure 7004(b)(9) which was done. All other arguments that other rules for service of process might have been followed are irrelevant. The requirements of due process were met by compliance with Bankruptcy Rule 7004(b)(9).

**D. The 11th Circuits Decision in *Ponsoldt* Was Followed**

Petitioner next argues that the 11th Circuit failed to apply its own prior decision in *Manufacturers Hanover Trust Company v. Ponsoldt*, 51 F.3d 938 (11th Cir. 1995). *Ponsoldt* does not support the Debtor's position. *Ponsoldt* stood for the proposition that where there are multiple methods for service of process under the law, the compliance with any one of those methods will suffice for due process purposes. As the Trustee complied with Bankruptcy Rule of Procedure 7004(b)(9), the *Ponsoldt* decision supports denial of this Petition.

**E. Petitioner's Constitutional Rights Were Not Violated**

The Petitioner's last argument contains no argument, but was rather merely a statement that the Debtor's constitutional rights under the Fifth Amendment of the United States Constitution had been violated. As previously shown, the due process requirements of the United States Constitution have been met and the Petition must be denied.

## CONCLUSION

For the aforementioned reasons, Respondent respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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# APPENDIX

**APPENDIX — EXCERPTS FROM TRANSCRIPT OF MOTION TO VACATE FINAL JUDGMENT DENYING DISCHARGE OF DEBTOR OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED OCTOBER 30, 1996**

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Judge Robert A. Mark

CASE NO. 92-30350
-BKC-RAM

ADV. NO. 92-1181
-BKC-RAM

In the Matter of:

CLAUDIA DEGENNARO and
ANTHONY DEGENNARO,

Debtors.

---

ROBERT C. FURR, Trustee,

Plaintiff,

v.

CLAUDIA DEGENNARO and
ANTHONY DEGENNARO,

Defendants.

*Appendix*

MOTION TO VACATE FINAL JUDGMENT DENYING DISCHARGE OF DEBTOR (CLAUDIA DEGENNARO), MOTION TO VACATE FINAL JUDGMENT DENYING DISCHARGE OF DEBTOR (ANTHONY DEGENNARO)

October 30, 1996

The above-entitled cause came on for Hearing, before the HONORABLE ROBERT A. MARK, one of the Judges of the UNITED STATES BANKRUPTCY COURT, in and for the SOUTHERN DISTRICT OF FLORIDA, 701 Clematis Street, West Palm Beach, Palm Beach County, Florida, at a session of said Court commencing at 10:30 a.m. on Wednesday, October 30, 1996, and the following proceedings were had:

* * *

[150] Port St. Lucia.

THE COURT: Okay. You have never affirmatively done anything in the bankruptcy to indicate where you were, or to otherwise seek relief or status or anything else from the end of '92 until sometime in '96?

MS. DEGENNARO: It would have been '95 that I had gotten back involved with the bankruptcy. When I saw something was being done wrong, that's when I started — decided to jump in and do something about something being done wrong.

THE COURT: Okay.

All right. We're going to have to wrap this up for today. I'm going to reserve on Mr. DeGennaro's motion until I have a chance to look at the memo that Mr. Ader has filed.

You're in Miami, correct?

MR. ADER: That's correct.

THE COURT: So if we need to have further argument as to whether or not to reopen the evidence, we can certainly do that in Miami with Mr. Osborne by phone, and if Mr. Goldstein and Mr. Markowitz want to participate, they are in Miami.

As to Mrs. DeGennaro's motion, I'm prepared to rule. The matter before the Court is the Debtor [151] Claudia DeGennaro's Motion to Vacate and Reverse Final Judgment Denying Discharge, filed on June 4, 1996, and an amendment to the motion that was filed on July 24, 1996.

The Court initially conducted a hearing on the motion in which certain documents were referenced, but it was not an evidentiary hearing, in that the Court did not at that point in time mark exhibits and take them into evidence. That hearing, which we will consider a preliminary, non-evidentiary hearing, took place on July 25, 1996. At the conclusion of that, I determined that we should set this for a full evidentiary hearing, allow time for discovery, and proceeded today with the evidentiary hearing in Palm Beach.

I've considered the exhibits introduced by Mrs. DeGennaro and by the trustee, the testimony of Mrs. DeGennaro and the trustee, Robert Furr, and the law applicable, as well as other items in the record that the Court can take judicial notice of from the bankruptcy case, as well as the prior pleadings in the adversary proceeding.

This is Adversary Proceeding 92-1181. The findings and conclusions of the Court in this contested matter are going to be put on the record and [152] will be the findings and conclusions required under Rule 7052 of the Federal Rules of Bankruptcy Procedure.

The background facts will not all be put into the record in terms of all of the dates, but in approximately February 1992, this bankruptcy case was transferred from the Southern — or Eastern District of Now York at or about the same time that it was converted to a Chapter 7. Robert Furr, the trustee, was appointed in this case and commenced the duties of a trustee.

The adversary complaint at issue was filed in November 1993. The summons and notice of trial was served by first-class mail on the debtor, Claudia DeGennaro, at the address, 4300 U.S. Highway No. 1, Suite 203-329, Jupiter, Florida 33477. One of the major issues brought by the debtor in her motion to vacate is a challenge to the adequacy of service of process based upon the fact that she was no longer, as she testified, getting mail at that address and that the trustee had notice of a more current address of the debtor.

I would note, by the way, that from the debtor's own testimony, it's unclear during the period of time when this summons was served, whether she was [153] still living at the address on Urdea Road or whether she had already moved to Palm City. The address that the complaint was served on is a mailbox address, equivalent to a post office box, although at a private entity.

The last exhibit by the debtor indicates that this was — Actually this is the application to the U.S. Post office indicating that the delivery is to be to Mailboxes Et Cetera, which is the private mailbox service located at the address indicated, 4300 U.S. Highway No. 1 in Jupiter.

The Court finds that service was properly effected under the rules. 7004(b)(9) specifically relates to service of process on a debtor — Sorry for the delays. I don't have my usual tools, in terms of my own code books and so forth, in front of me — The applicable rule is 7004(b)(9), which specifically says that you serve a debtor after a petition has been filed and until the case is dismissed or closed by:

> "Mailing copies of the summons and complaint to the debtor at the address shown in the petition or statement of affairs or to such other address as the debtor may designate in a filed writing, and if the debtor is represented by an attorney, to the attorney at the attorney's post [154] office address."

This rule has to be interpreted in light of this case having started in New York and being transferred to Miami, and thereafter using the address by the debtor in the Miami case

as the address of record, and I find that the 4300 U.S. 1 address was the address of record, the address of the debtor, designated by the debtor, for purposes of Rule 7004(b)(9), and there is no affirmative filing by the debtor in the bankruptcy case or affirmative notice by the debtor to the trustee to utilize a different address. The various exhibits that have been introduced by the trustee show that through, at least, July of 1996, the debtor was signing pleadings and receiving mail at the post office mailbox address.

The most significant thing I find in terms of service or process, which I referred to in my questioning of Mrs. DeGennaro, is that this in not a home address. It's a mailbox address, and her defense relies on the allegation that she had actually moved sometime in May to Bamboo Lane, and then had moved again sometime in July to Urdea Road, and then moved again sometime in November to Palm City, and simply put, so what?

The debtor's mailing address as of record [155] was a mailbox. There was never notice of what her actual residence address was given to the trustee, nor was there any effort by the debtor to have a forwarding address, where the trustee at one point in time, through phone conversations and a note from an attorney for a landlord, had the Bamboo Lane address. Somewhat ironically the attorney for that creditor initially used the wrong address for the client, who he was representing in the property that he was seeking stay relief to evict the debtor from, which was, in fact, the Urdea Road address.

*Appendix*

There are some documents in the file, no doubt, that show that the trustee had pleadings and letters that showed that this creditor was seeking to evict from Urdea Road, but I don't find that to be significant in assessing the adequacy of service. The trustee was not obligated to diligently look through everything that was filed or to take note of everything that was filed in order to determine a home address.

Very significant to me was that the debtor, while producing evidence that this post office box may have been opened for some limited time, that the trustee — Let me finish that sentence. While producing evidence that the post office box may have [156] been opened for only a limited time, the debtor simply stopped checking the mailbox, apparently after June, even though she was still using that address in July in pleadings to the Court, and simply chose not to pick up mail there. There is no evidence that Mailboxes Et Cetera evicted her from the mailbox and no longer accepted mail at that location. Instead, the unconverted evidence is that it wasn't until April of 1993, Trustee's Exhibit 13 and its subparts, that all of this mail was returned, apparently, according to Mailboxes Et Cetera representative, because the debtor had simply stopped picking up the mail.

I am not cold-hearted or unsympathetic to the debtor's personal situation during this period of time. The record certainly supports the statements by the debtor as to what she was going through in terms of trying to deal with her personal problems, and I think Ms. DeGennaro, not necessarily in her self-interest on the legal issues here, but was very candid when she said she couldn't have handled any of the business and legal problems at the time. She was

doing her best to stay above water and handle her domestic matters, and that was her candid explanation for why she just didn't even pick up mail that may have involved business or legal matters in that period [157] of time, in the second half or late '92 and into 1993.

In short, there is simply no evidence that would demonstrate that the trustee had actual knowledge of a new address sufficient to require service at some other address, other than the address that the debtor used, and in fact, that even with knowledge, constructive knowledge, in the record of some other addresses, that the trustee was under no obligation to utilize another address in attempting service.

The adequacy of service — To the extent I may be just recharacterizing or redundant, I apologize. Adequacy of service is further supported by the evidence that Mrs. DeGennaro, had she gone to the mailbox, in all likelihood would have received the summons. That is that notwithstanding the implications at the earlier hearing that she moved and the trustee knew of and didn't use her new address, what it now appears is that she lived at various places during a point in time in which she was using a mailbox for business and legal matters and just simply decided at some point to stop picking up the mail there. In other words, that was still, as far as I can tell from the evidence, a good and valid address, not simply the address of record that the trustee [158] used, but an address that was where the debtor could and would have still received mail had she chosen to.

Again, even if the trustee had notice of Urdea Road, there is no indication that Ms. DeGennaro was necessarily still at

Urdea Road at the time that the complaint was mailed, nor certainly there at the time of the additional notices that she claimed she was entitled to.

I will make brief mention that normal procedure that we employ and put in the pretrial requirements is that if the plaintiff wants to avoid coming to a pretrial conference, you need to move for a default and default judgment. You can show up at the pretrial conference though, and if the defendant hasn't responded and the defendant isn't there, I will entertain, as I did in this case, an ore tenus motion for default judgment, and if there is no matters that require specific proof, the judgment will be entered upon submission by the plaintiff, and that is what happened here.

In sum then, I find that service was effected in accordance with 7004(b)(9). The debtor did not, as she was required to do under the rules, notify the trustee of any change of address where mail should have been sent, as required by Bankruptcy Rule [159] 4002(5).

The service proper or the standard to set aside a default is virtually unmeetable given the facts of this case, and while I'm not reaching the meritorious defense issue, because of the length of time that was available today, Ms. DeGennaro has had an opportunity to show the other elements for setting aside a default judgment, excusable neglect and reasonable diligence. Frankly, while I'm not going to parse this in detail, it would appear to me under Rule 60 — Let me back up. It would appear that the rule predicate for this would be Rule 55(c) of the Federal Rules of Civil Procedure applicable in an adversary proceeding by virtue of Bankruptcy Rule 7055, which says:

*Appendix*

> "For good cause shown, the court may set aside an entry of default, and if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)."

If you look at Rule 60(b), 60(b) includes relief from a judgment for, (1), mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time and for reasons (1), (2), and (3) of 60(b), not more than one year after the judgment or proceeding was entered or [160] taken. So it would appear on the face of the rule that there is one-year limitation for relief from judgment for excusable neglect, and that it's not even a matter of evidentiary interpretation.

However, if we look at the catchall phrase, which certainly can be, arguably, applied in any instance at any time, and that is 60(b)(6), says: "Any other reason justifying relief from the operation of the judgment," that still says the motion shall be made within a reasonable time. I don't find the time to be reasonable. I understand that in the context of Ms. DeGennaro's life and priorities, it was reasonable for her to go about her life and restart her life as best she could, and it may have appeared to be in reasonable time once she got back involved in the bankruptcy case in 1995, but there is no way to plug in her personal problems into the conduct of a Chapter 7 case and say that a debtor can choose to essentially withdraw from participation in a bankruptcy for over two years, and then come back in and claim that there is reasonable diligence and acting within a reasonable period of time to seek relief, so I don't find that the debtor has satisfied the reasonable diligence or seeking relief within a

reasonable time under 60(b)(6), even if 60(b)(6) could be used as a possible [161] grounds for relief.

To the extent excusable neglect is argued as an element, given the debtor's testimony, while in some broader philosophical sense, and I'm not sitting in moral judgment, I could understand and excuse why the debtor chose to make her decisions that she did in 1992, but legally for excusable neglect in the context of not staying on top of business and legal matters, by not picking up mail and not participating in the case, it just isn't there, so I find for the reasons stated that the debtor was properly served, that the debtor has not demonstrated excusable neglect and that the debtor has not acted within a reasonable time to seek relief under Rule 55 and Rule 60 of the Civil Procedure Rules as applicable in this adversary proceeding.

So for those reasons, which will be incorporated by reference in a short order to be submitted by the trustee, the motion by Mrs. DeGennaro to vacate the default judgment is denied.

I'm going to ask Mr. Furr or Mr. Osborne to simply submit an order setting a status conference as to Mr. DeGennaro. By the time I get the order, that will trigger my decision as to whether we do need or don't need the status conference. If I don't set a [162] status conference, I will enter some other type of order or set a further hearing just to announce a ruling, but rather than leaving it open-ended, if I don't get a chance to look at it between now and receiving that order in a few days, I will just set it for further hearing in Miami. Absent any further direction by the Court, it will be a non-evidentiary status conference.

I don't have further time today and with the late submission of the memo, it doesn't permit sufficient review by the Court or the other side to argue those issues today. The 17(c) issue, the competency issue, in that context I believe is somewhat new to the Court and the other parties to the proceeding.

I apologize to the Talmo folks for the delay, but it seemed sensible to me to spend a little more time to finish one, rather than leaving both open, and I'm afraid we might not have had time, even if we started an hour ago to finish Talmo.

We will take about a ten minute recess, and at the beginning of the Talmo case, I will come back and I want to address the legal standards the parties believe are applicable and hear, not an opening statement, but a summary of who the witnesses are, and [163] we'll decide, if we're going to go an hour or two, which witnesses it makes most sense to take care of, assuming we may wind up continuing the hearing in Miami, rather than back up here, so about ten minutes for Talmo.

Before we recess, any questions on DeGennaro?

MR. OSBORNE: Yes, your Honor. May I have the opportunity to respond by memo on the 17(c) issue? I've never really looked at this issue, if I might respond in three or four days and submit a memo?

THE COURT: Yes. Put a line in the order setting a status conference that any supplemental pleadings by any of the parties can be filed, and let's leave a date blank, and we will do it that way.

MR. OSBORNE: Thank you, your Honor.

THE COURT: Okay. Thank you.

(Whereupon, the hearing was concluded.)

* * * *

Supreme Court, U.S.
FILED
SEP 13 2000
CLERK

(3)

NO. 00-208

IN THE
# SUPREME COURT OF THE UNITED STATES

CLAUDIA DEGENNARO,

*Petitioner*,

v.

ROBERT C. FURR, chapter 7 trustee,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

## REPLY BRIEF

Claudia DeGennaro, *Pro Se*
462 S.W. Molloy St.
Port St. Lucie, FL 34984
561/340-1960

## LIST OF PARTIES

| Petitioner | Counsel |
|---|---|
| Claudia DeGennaro | Pro Se |
| **Respondent** | |
| Robert C. Furr | Furr & Cohen, P.A.<br>1499 W. Palmetto Park Rd.<br>Suite 412<br>Boca Raton, FL 33486 |
| **Other Parties** | |
| Janie Dean Chevrolet, Inc.<br>Patricia Dean<br>Estate of Roger Dean | Richard Goldstein, Esq.<br>Goldstein & Tanen, P.A.<br>Two South Biscayne Blvd.<br>Suite 3250<br>Miami, FL 33131 |
| United States Trustee | Solicitor General of the<br>United States<br>Department of Justice<br>950 Pennsylvania Ave., N.W.<br>Room 5614<br>Washington, D.C. 20530-0001 |

## TABLE OF CONTENTS

*Page*

1. The lower courts failed to address whether Federal Rule of Civil Procedure - Rule 4 (1992) was applicable ..... 1

2. Past deeds recalled...The trustee stalled, stonewalled and stymied the debtor's discovery efforts ..... 1

3. Facts not disputed by the Respondent ..... 3

4. The Whole Truth.... Misstatements by the Respondent
   - A. "Repeated Requests" ..... 4
   - B. Respondent asserts ..... 5

5. The 11th Circuit Court's decision in *Ponsoldt* was never applied to this case. ..... 6

6. The Petitioner's Constitutional Rights were Violated ..... 6

Conclusion ..... 8

Appendix

# TABLE OF CITED AUTHORITIES

## Cases

*Manufacturers Hanover Trust Company v. Ponsoldt*, 51 F.3d 938 (11th Cir. 1995) ..... 6

## Statutes, Rules and Regulations Cited

*1992* Fed.R.Civ.P. 4 ..... 1, 6

*1992* Fed.R.Bankr.P. 7004(b)(9) ..... 1, 7

## Treatises and Other Authorities

Collier on Bankruptcy (15th ed.), §4002.06 ..... 7

## INDEX TO APPENDIX

Excerpts from Trustee's Adversary Complaint Objecting to the Discharge of the Debtors Dated and Filed on November 12, 1992 ..... App.1

Transcript of Hearing of October 20, 1992 on Motion for Relief from Stay and/or for Adequate Protection (Calvin & Patricia Randolph) ..... App. 3

Amended Order Granting Creditors Calvin and Patricia Randolph Motion for Relief in the Automatic Stay ... App. 6

Trustee's Motion for Protective Order and Motion to Quash Subpoena dated October 2, 1996 ..... App. 7

Debtor's Motion to Compel Trustee to Produce, and Permit Inspection and Copying of Records dated October 17, 1996 ..... App. 9

Affidavit of Robert D. Neher ..... App.12

## ARGUMENT IN SUPPORT OF GRANTING WRIT

### 1. The lower courts failed to address whether Federal Rule of Civil Procedure - Rule 4 (1992) was applicable.

Although the Respondent contends that "the Bankruptcy Court *specifically addressed* whether other Rules applied and found that the Trustee only needed to comply with Bankruptcy Rule of Procedure 7004(b)(9) which was done."...this is a misstatement of the facts and the Respondent seeks to deflect attention from the truth. (emphasis added) (Respondent Br. at 6) The Respondent understandably makes no effort and fails to cite any part of the record that supports his new theory that the bankruptcy court "addressed whether other Rules applied", as the bankruptcy court never addressed any other rule that applied to service of process or process of service. The records clearly show that the only rule that pertained to service that the bankruptcy court and the subsequent appeal courts addressed was 7004(b)(9). (Respondent Br. App. at 5a). In particular, the lower courts, when specifically requested by the Debtor, did not and would not address whether Fed.R.Civ.P., Rule 4 (1992 version) applied to this instant case. There is not a scintilla of evidence to support the Respondent's contention that the lower courts "specifically addressed" the issue of whether the 1992 Fed.R.Civ.P., Rule 4, was applicable to this instant case. Simply, the bankruptcy court and the subsequent appeal courts ignored and laid silent as the to Debtor's request to make a determination on this issue.

### 2. Past deeds recalled...The trustee stalled, stonewalled and stymied the debtor's discovery efforts.

The Debtor sought to follow the bankruptcy court's direction in the discovery and pre-hearing process on the Debtor's Motion to Vacate the Final Default Judgment Denying

Discharge. The record will show that the Respondent from July 1996 through October 1996 refused to allow the Petitioner to review his documents in his possession relative to the Denial of Discharge matter. The Petitioner wrote the Respondent several letters and called his office, but the Respondent refused to exchange his witness and document list until the eleventh hour and only after the Debtor had obtained a subpoena, the Trustee filed a Motion to Quash the Subpoena and the Debtor made a Motion to Compel. (Petitioner R.Br.App 7 & 9) The record will show that the Trustee deliberately refused and failed to complete the discovery requirements and give the Debtor all the required documents at the time of the hearing on the Debtor's Motion to Vacate the Default Final Judgment Denying her Discharge.

The Respondent asserts that "the unrefuted testimony as well was that the Trustee's office did not receive the Complaint back in the mail from the closed Mailboxes, Etc. box until April 30, 1993." (Respondent's Br. at 3) This is disputed and a review of the record, however, will reveal that such an occurrence is highly unlikely. The Respondent testified that someone in his office used an office stamp[1] to date stamp the returned mail reportedly received on April 30, 1993. Yet, it is important to note that the manager of the rented post office box, who has nothing to gain or lose by his testimony in this case, swore that he returned the mail on November 6, 1992[2]. (Petitioner R.Br App. 12). The Respondent did not even offer a valid or a reliable explanation as to the huge time difference from

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[1]No official Post Office date stamp confirmed this date.

[2]Affidavit attached to the Debtor's Motion for Reconsideration of the Motion to Vacate the Final Default Judgment Denying her Discharge.

November 6, 1992 to April 30, 1993, nearly 6 months as to when he claimed he received the Summons and Complaint back from the closed post office box. The reality and truth is the Debtor's rented post office box was closed on the 6th day of November, 1992.

It makes no sense that a trustee, who is noted and recognized as a sophisticated bankruptcy expert and trial lawyer, would not "go through every document" in his possession to determine if a good cause existed against the debtor to deny her discharge and if there was supporting evidence to substantiate allegations (including the allegation that the "debtors changed residences without informing the trustee") and then not "go through every document" to find a more current and reasonable address for the debtor to effectuate service under the circumstances. In order for the trustee to make a truthful and accurate allegation that the debtor committed a misconduct, then he would have had to go "through every document", particularly to determine whether the debtor had filed a change of address notice.

**3. Facts not disputed by the Respondent:**

- The Debtor was out of money.
- The Debtor was being evicted from her home.
- The Trustee was noticed that the Debtor's landlord sought to evict the Debtor from her home. (Petitioner R.Br.App.3)
- The Trustee gave the landlord's attorney two addresses to send notification to the Debtor of impending bankruptcy proceedings for the eviction proceeding.(Petitioner R.Br.App.4, lines 16-18 and App.5, lines 19-20)
- The Respondent did not follow the Federal Rules of Civil Procedure, Rule 4(c)

Simply, the Debtor could not afford a rented post office box and did not renew the lease on the rented post office box, stop paying the rent on the rented post office box and stopped using and picking up mail at the rented post office box. The Respondent contends that "the Debtor herself testified that she stopped picking up her mail due to personal reasons and this was a large factor in the Court's determination that any failure by the Debtor to receive service of process was due to her own actions." (Respondent's Br. at 7) In actuality, it was the Petitioner's lack of funds that caused her to stop using the rented post office box and did not renew the post office box rental lease when it expired in August of 1992. Therefore, due to the economics (the lack thereof), the Debtor used her home address to receive her mail by August 1992. The fact that the Debtor stopped picking up mail at a closed post office box in August 1992 because she did not renew her lease should not be held against her. The Respondent chose to only use the closed post office box in November 1992 to send his Summons and Complaint, when he had other more reasonable options, the Petitioner's home address. The reality and uncontroverted truth is the debtor's rented post office box was closed on the 6th day of November, 1992 and all mail was immediately returned that day,

**4. The Whole Truth.... Misstatements by the Respondent**

**A. "Repeated Requests".** The Respondent makes a misstatement in his brief were he states "...Paragraph 13 of the Complaint wherein the Trustee alleged that despite repeated requests, the Petitioner refused to divulge to the Trustee her residence address as the Petitioner had moved from her original residence post-petition." (Respondent Br. at 2) First, the Respondent ad-libbs by weaving new words into the Complaint

that do not and did not exist by stating and implying in his brief before this Court that the Respondent had made "*repeated* requests". (emphasis added) It is important to note that the Complaint at Paragraph 13 simply does not make that allegation. (Petitioner R.Br. App.2) More importantly, the Petitioner denies that this allegation and the Complaint does not even offer a date, time or evidence to support such a contention. Moreover, the Petitioner was unable to refute this allegation due to the fact that the Respondent withheld documents from the Petitioner (Petitioner R.Br. App.7 & 9) and due to the bankruptcy court's refusal to allow the Debtor to put on or discuss her meritorious defense. The Respondent further stretches by contending that the Petitioner refused "to give her residence address to *any party* involved in the case". (Respondent Br. at 8) There is no evidence in the record to support this, not even a scintilla and as such the Respondent cites no evidence. The uncontroverted truth of the matter is the Respondent never asked the Petitioner for her residence address and further exaggerates that "any party involved in the case" asked for the Debtor's residence address. No party, including the Trustee, asked the Debtor for her residence address.

**B. Respondent asserts, to the contrary of the record, that "the Trustee did not know the Debtor's home address".**

The record is clear below and confirmed, from an unbiased source, that the Trustee did know the Debtor's home address. The Trustee told the Debtor's landlord's counsel what two addresses to use in the service of process for their Motion to Lift the Automatic Stay in order to evict the Debtor, during the same time frame as when the Trustee mailed his Summons and Complaint to deny Claudia DeGennaro's Discharge to the closed post office box. (Petitioner R.Br.App.4, lines 16-18 and App.5, lines 19-20)

**5. The 11th Circuit Court's decision in *Ponsoldt* was never applied to this case.**

The 11th Circuit Court merely echoed the district court and both courts just recited the caption of the case and never analyzed or compared the facts to this instant case. The Respondent cites *no place in the record* below where either court used this case in their decision. More importantly, this case regards the issue **not** as the Respondent portrays the matter by stating that "*Ponsoldt* stood for the proposition that where there are multiple methods for service of process under the law....", but rather this case regards the question of what Federal rules applied in 1992 to service of process, particularly Fed.R.Civ.P.4, which is the same question presented herein. (Respondent Br. at 10)

**6. The Petitioner's Constitutional Rights were Violated**

Lastly, the Trustee made unsubstantiated allegations in his Complaint against the Debtor and such were unfounded. It is important to note that the Debtor had a strong and meritorious defense, but was not afforded an opportunity and was actually precluded from presenting her defense and any evidence to the bankruptcy court. The bankruptcy court simply allowed the Trustee to put his side on, but did not allow the Debtor the opportunity to put forth her evidence. Therefore, there was no equality or fairness, simply no justice.

The Petitioner asserts, again, that in an *in personam* proceeding, the Respondent is required to have personally served the Petitioner to effectuate service and not just mail the Summons and Complaint to a closed post office box (known or unknown to be closed).

The Respondent hangs his hat on the Debtor's failure to file a change of address with the bankruptcy court. It is important to note that *Collier on Bankruptcy*, a recognized authority on bankruptcy procedures and matters, states in §4002.06 that "*Presumably, an individual debtor will not be aware of this requirement...*", thus only an attorney would know that a debtor is required to notify the court when they change their address. (emphasis added) The Debtor, simply, was not aware of the technical requirement to file a change of address with the court.

The Petitioner contends that the need for the broadest interpretation of the service of process and process of service rules, far outweighs the need to take a narrow interpretation of the law in order to achieve the goal, obtain and maintain minimal due process requirements, particularly since denial of discharge is an *in personam* matter. Thus, because all the courts below simply and narrowly applied only Federal Rules of Bankruptcy Procedure, Rule 7004(b)(9) it is too narrow and grossly unfair under all the circumstances.

The Petitioner was unfairly deprived of the all important right to defend herself, as the Respondent took advantage of the situation and took advantage of the Petitioner who had no attorney to assist her. The Petitioner would have objected to and defended herself had she known about the impending proceeding that the Trustee had surreptitiously and wrongly initiated against her, as the Debtor had a valid defense.

## CONCLUSION

For the reasons set forth in the Brief for the Petitioner and in this Reply Brief, the judgments of the lower courts including the bankruptcy court must be reversed to the extent that they refused to apply proper legal standards and rules of service of process and process of service; and the factual conclusions were in error.

Respectfully submitted,

Claudia DeGennaro

Claudia DeGennaro, Pro Se
462 S.W. Molloy Street
Port St. Lucie, Florida 34984

Dated: September 13th, 2000

# APPENDIX

**APPENDIX - EXCERPTS FROM TRUSTEE'S ADVERSARY COMPLAINT OBJECTING TO THE DISCHARGE OF THE DEBTORS DATED AND FILED ON NOVEMBER 12, 1992**

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE:
CLAUDIA DEGENNARO and
ANTHONY DEGENNARO,

CASE NO. 92-30351-BKC-RAM
Chapter 7

Debtors.
_____/

ROBERT C. FURR, TRUSTEE IN BANKRUPTCY,

Plaintiff,

ADV. NO. 92-1181-BKC-RAM-A

vs.

CLAUDIA DEGENNARO and
ANTHONY DEGENNARO,

Defendants.
_____/

* * *

## COMPLAINT OBJECTING TO DISCHARGE OF THE DEBTORS

13. During the course of the proceedings in the main case, the Debtors changed residences and refused to disclose the new residence to the Trustee.

## COUNT III
## 727(a) (2)(B)

23. (b) The Debtors changed residences without informing the Trustee and decline to answer any questions the Trustee regarding the change of residence;

* * * *

**APPENDIX - TRANSCRIPT OF HEARING OF OCTOBER 20, 1992**

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In the Matter of:

CLAUDIA DEGENNARO and ANTHONY DEGENNARO,

CASE NO. 92-30350-BKC-RAM

Debtors.
_____/

MOTION FOR RELIEF FROM STAY AND/OR FOR ADEQUATE PROTECTION (CALVIN & PATRICIA RANDOLPH)

October 20, 1992

The above-entitled cause came on for Hearing before the HONORABLE ROBERT A. MARK, one of the Judges of the UNITED STATES BANKRUPTCY COURT, in and for the SOUTHERN DISTRICT OF FLORIDA, at Room 329, 701 Clematis Street, West Palm Beach, Palm Beach County, Florida, at a session of said Court commencing at 4:20 p.m. on Tuesday, October 20, 1992, and the following proceedings were had:

APPEARANCES:

Nadel & Associates, P.A., by
Richard D. Nadel, Esquire,
Attorney for Calvin & Patricia Randolph

THE COURT: DeGennaro, motion for stay relief.

MR. NADEL: Yes, your Honor.

THE COURT: Did you notice Mr. Furr?

MR. NADEL: Yes, I did. He just spoke with me and has no objection. We have got an order.

THE COURT: Okay. What does this involve?

MR. NADEL: I represent Mr. And Mrs. Randolph who own a property of which Mrs. DeGennaro signed a lease for and has not paid, as mentioned in the motion, since July 15th. We would like relief from stay to evict her.

THE COURT: Is she living there?

MR. NADEL: Yes, I believe so.

THE COURT: And how did you serve her with notice?

MR. NADEL: I have served notice upon, as you can see, both to, I spoke to Bob Furr and I asked him for the addresses. I got two addresses that I have served her

with, one at 4300 South U.S. Highway #1, Suite 203, 329, Jupiter, Florida, and the other the property itself where I believe she is living.

THE COURT: When you say at the property, you just mailed it to that address?

MR. NADEL: I believe so, yes.

THE COURT: All right. I will grant the relief.

MR. NADEL: I have a proposed order which Mr. Furr is in agreement with.

THE COURT: All right.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE:

ANTHONY DEGENNARO,
CLAUDIA DEGENNARO and

Debtor. /

CASE NO. 92-30350-BKC
CHAPTER 7

AMENDED ORDER GRANTING CREDITORS CALVIN RANDOLPH AND PATRICIA RANDOLPH MOTION FOR RELIEF IN THE AUTOMATIC STAY

THIS CAUSE, being heard on CALVIN RANDOLPH and PATRICIA RANDOLPH's Ex Parte Motion to Amend the Court's October 20, 1992 Order on Petitioner's Motion for Relief from Stay and the Court being fully advised in the premises it is therefore,

ORDERED AND ADJUDGED as follows:

GRANTED. The Creditors, CALVIN RANDOLPH and PATRICIA RANDOLPH, shall have complete Relief from the Automatic Stay to pursue an eviction action or otherwise remove the Debtors, ANTHONY DEGENNARO and CLAUDIA DEGENNARO, from the subject property located at 5898 Urdea Road, Jupiter, FL. PCN # 00424035000003050

DONE AND ORDERED at West Palm Beach, Florida, in said District, this 02 day of December, 1992.

/s/
ROBERT A. MARK
US Bankruptcy Judge

**APPENDIX - EXCERPTS FROM TRUSTEE'S MOTION FOR PROTECTIVE ORDER AND MOTION TO QUASH SUBPOENA DATED OCTOBER 2, 1996**

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

| | |
|---|---|
| CLAUDIA DEGENNARO and | CASE NO. 92-30351-BKC-RAM |
| ANTHONY DEGENNARO, | Chapter 7 |
| Debtors. | |
| _____/ | |
| ROBERT C. FURR, TRUSTEE IN BANKRUPTCY, | |
| Plaintiff, | ADV. NO. 92-1181-BKC-RAM-A |
| vs. | |
| CLAUDIA DEGENNARO and ANTHONY DEGENNARO, | |
| Defendants. | |
| _____/ | |

TRUSTEE'S MOTION FOR PROTECTIVE ORDER AND MOTION TO QUASH SUBPOENA

COMES NOW ROBERT C. FURR, TRUSTEE IN BANKRUPTCY, by and through counsel, and for Motion for Protective Order and Motion to Quash Subpoena would state as follows:

14. Defendant, Claudia DeGennaro, caused to be served upon Records Custodian, Robert C. Furr, Trustee in Bankruptcy, a Subpoena in a Case Under an Adversary Proceeding on September 25, 1996, requesting numerous documentation in preparation for the hearing on Debtors' Motions to Vacate Final Judgment Denying Discharge. A copy is attached hereto as Exhibit "A".

15. The Trustee objects to the Subpoena as being overbroad and beyond the scope of the pending Motion to Vacate Final Judgment of Discharge.

16. However, the Trustee will produce documents relating to Counts of the Complaint Objecting to Discharge of Debtor and documents relating to the Trustee obtaining the Default and Final Judgment.

17. The Trustee is producing the following documents to the debtor:

* * * *

**APPENDIX - EXCERPTS FROM DEBTOR'S MOTION TO COMPEL TRUSTEE TO PRODUCE AND PERMIT INSPECTION AND COPYING OF RECORDS DATED OCTOBER 17, 1996**

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In re:
CLAUDIA DEGENNARO and
ANTHONY DEGENNARO,

Debtors.

CASE NO.: 92-30351-BKC-RAM
92-30350-BKC-RAM

ADV. NO.: 92-11-81-BKC-RAM

_____/

DEBTOR'S MOTION TO COMPEL TRUSTEE TO PRODUCE AND PERMIT INSPECTION AND COPYING OF RECORDS

COMES NOW, Debtor, CLAUDIA DEGENNARO, and moves this Court for an Order compelling the Trustee, ROBERT C. FURR to produce and permit inspection and copying of his records and states the following in support thereof:

1. At hearing on July 25, 1996 a preliminary hearing was held on the Debtor's Motion to Vacate and Reverse Final Judgment Denying Discharge of the Debtor. At that time this Court directed the Trustee and the Debtor to exchange witness and document lists that each party would be using at the hearing to Vacate Final Judgment Denying Discharge.

2. On August 6, 1996, the Debtor, Claudia DeGennaro wrote the Trustee a letter requesting that the exchange take place by August 16, 1996.

3. In response, the Trustee sent a letter on August 14, 1996 stating he had scheduling problems and could not meet the date. The Trustee promised that "as soon as we have a hearing date, my office will contact you to make the necessary arrangements." The Trustee has never contacted the Debtor to make new arrangements.

4. Then on August 20, 1996, this Court set a hearing date for October 30, 1996. The Debtor waited for the Trustee "to make the necessary arrangements." It became apparent that the Trustee had no intention to fulfill his promise. Because of the Trustee's lack of cooperation and silence as to the documents and witnesses he planned to use at the upcoming hearing, the Debtor felt that discovery and stronger measures were necessary to help solve the situation. The Debtor, Claudia DeGennaro then had a subpoena served on the Trustee on September 25, 1996 which required the Trustee on October 4, 1996 to produce and permit inspection and copying of all documents that related in any way to the matter at hand, the Discharge of the Debtors. See attached copy, Exhibit "A".

5. In response to the subpoena, the Trustee made a motion on October 2, 1996 for a Protective Order and Motion to Quash the Subpoena. The Trustee objected to the subpoena "as being overbroad and beyond the scope of the pending Motion to Vacate Final Judgment of the Discharge." The Trustee never specified what documents were "overbroad" or what documents were beyond the scope of the pending Motion". The Trustee intentionally limited the Debtor's discovery by proceeding to pick certain documents to be produced and copied out of the subpoena's specific list.

6. The Debtor disclosed her witness and document lists to the Trustee on October 10, 1996, with the provision that she could revise her lists due to the Trustee's refusal to produce certain documents. See attached copy, exhibit "B".

7. To this date, nearly three months after the Court required that an evidentiary hearing be held on the Debtor's Motion to Vacate the Final Judgment Denying Discharge and required the parties to exchange witness and document lists, the Trustee has still failed to disclose to the Debtor his witnesses or his documents as required by the Court that he plans on using at the hearing.

* * * *

# AFFIDAVIT

COUNTY OF PALM BEACH)
STATE OF FLORIDA )

I, Robert D. Neher, being first duly sworn upon his oath deposes and states:

1. I am the manager of the business, Mail Box Etc., located at 4300 U.S. Highway #1, Jupiter, Florida.

2. On August 25, 1992 the mailbox rental agreement for a box rented by Claudia and Anthony DeGennaro, 4300 U.S. Highway #1, Box 203-329, Jupiter, Florida had expired and was not renewed.

3. After placing several notices of my intent to close the box for not renewing the rental agreement, I closed the mailbox on November 6, 1992. All mail addressed to the DeGennaros was immediately, that day, returned to the original senders by marking the mail "Return to Sender" and I mailed the mail back through the United States Post Office.

4. Any mail for Claudia and Anthony DeGennaro that I subsequently received after closing the box was immediately returned to sender without delay.

5. On October 14, 1996 Robert C. Furr's office had a subpoena served on me requesting that I supply his office, all records regarding the lease of the DeGennaros' box. I complied with his request by faxing the documents on October 28, 1996 to his office.

6. On or about October 25, 1996 I received another piece of mail addressed to Claudia DeGennaro from the

law office of Furr & Cohen, P.A., Interstate Plaza, Suite 412, 1499 West Palmetto Park Rd., Boca Raton, FL 33486. I immediately sent the mail back to Furr & Cohen, P.A.

Dated this 16 day of November, 1996.

/s/
Robert D. Neher

Sworn to and subscribed before me
this 16th day of November, 1996.

/s/
Notary Public, State of Florida
My commission expires: 30 March 2000

MICHAEL B. RICKARD
My Commission CC529607
Expires Mar. 30, 2000